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No. 82-695

IN THE

Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLANT, FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA.

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Questions Presented.

1. Does this Court have jurisdiction over this appeal?

2. Did the United States District Court have subject matter jurisdiction over the Complaint for Failure to Honor Garnishment and for Declaratory Relief which was originally filed in State court by the Franchise Tax Board (the Board) and removed by the Construction Laborers Vacation Trust For Southern California et al., (CLVT) to District Court where the Board's causes of action were based solely on State law and any federal question was raised only as a defense?

3. Is California prohibited by the doctrine of preemption from collecting delinquent personal income taxes from a vacation fund regulated by some of the provisions of the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq. (commonly known as ERISA), notwithstanding the fact that

   a. The California statute which authorizes said collection (California Revenue and Taxation Code section 18817) does not "relate" to the vacation fund in that it does not regulate the terms or conditions of the fund.
   b. Congress did not specifically provide that ERISA was intended to preempt State levy statutes such as the California statute?
   c. The California statute neither conflicts with any specific provision of ERISA nor interferes with the Congressionally stated purpose of ERISA;

4. Should the provisions of ERISA be interpreted in such a way as to not interfere with the sovereign power of the State of California to assess and uniformly collect its taxes if this interpretation would avoid the question as to whether ERISA is unconstitutional as a violation of the Tenth Amendment?

Parties to This Action.

The parties to this action are:

1. The Franchise Tax Board of the State of California.
2. The Construction Laborers Vacation Trust for Southern California.
3. Edward Ashton.
4. Al Atwood.
5. Gary Bronneck.
6. John R. Clarke.
7. R.C. Gallyon.
8. Richard Greenberg.
9. Roger Jaska.
10. William Middleton.
11. Tony Hoffman.
12. William R. McClain.
13. Armando Lopez.
14. Joe Rivera.
15. Ray M. Wilson.
16. James Keyes.
17. Boyd McDougal.
18. Carlos Cerna.

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FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
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Appellees.

BRIEF OF APPELLANT, FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA.

OPINIONS BELOW.

The Opinion of the Court of Appeals for the Ninth Circuit, filed on June 22, 1982, is reported at 679 F.2d 1307 and is reproduced at A.1-A.14 of the Board's Jurisdictional Statement.[1] The Order of the Court of Appeals for the Ninth Circuit denying the Board's Petition For Rehearing was filed on July 21, 1982, and is reproduced at A.24. The Judgment of the United States District Court for the Central District of California was filed on December 3, 1980 and is reproduced at A.15-16. The Findings of Fact and Conclusions of Law for the United States District Court for the Central

[1]Citations in the form "A. ...." are to the Appendix to the Jurisdictional Statement filed by the Franchise Tax Board and in the form "J.A. ...." to the Joint Appendix.

District of California were filed on December 3, 1980 and are reproduced at A.17-23.

JURISDICTION.

This suit was originally brought in the Superior Court of the State of California for the County of Los Angeles by the Board. (J.A. 3.)

CLVT removed the case to the United States District Court for the Central District of California. (J.A. 87.) The District Court denied the Board's Motion To Remand. (J.A. 105.)

The District Court granted summary judgment for the Board. (A.15.) CLVT appealed to the Ninth Circuit. The Opinion of the Court of Appeals for the Ninth Circuit reversing the District Court's granting of summary judgment for the Board was filed on June 22, 1982. (A.1-14.) A timely Petition For Rehearing was filed on July 6, 1982. (A.25-36.) The Petition For Rehearing was denied on July 21, 1982. (A.24.)

The Board filed a Notice of Appeal to the Supreme Court of the United States from the Opinion on September 17, 1982, with the clerk, United States Court of Appeals for the Ninth Circuit. (A.37.) This appeal was docketed on October 18, 1982. On December 13, 1982, this Court postponed further consideration of its jurisdiction to the hearing of the case on the merits. (J.A. 106.)

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(2). Such a direct appeal is allowed where a Court of Appeals holds a State statute to be invalid as repugnant to the Constitution, treaties or laws of the United States. Herein the Court of Appeals for the Ninth Circuit held that California Revenue and Taxation Code section 18817 was preempted by ERISA insofar as it allowed the Franchise Tax Board to levy on a welfare

plan (here a vacation fund). (*See Delta Airlines v. Kremarsky* (2d Cir. 1981) 666 F.2d 21, vacating (2d Cir. 1981) 650 F.2d 1287, prob. juris. noted (1982) 102 S.Ct. 1968 and *Alessi v. Raybestos-Manhattan, Inc.* (1981) 451 U.S. 504.)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

California Revenue and Taxation Code section 18817 provides in pertinent part:

> "The Franchise Tax Board may . . . require any employer, person, . . . having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer . . . to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer . . . and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate."

California Code of Civil Procedure section 1060 provides in pertinent part:

> "Any person . . . who desires a declaration of his rights or duties with respect to another, . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action in the superior court. . . ."

29 U.S.C. § 1002 (ERISA § 3) provides in pertinent part:

> "For purposes of this subchapter:
>
> "(1) The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, . . . (A) . . . vacation benefits, . . .
>
> "(2)(A) . . . the terms 'employee pension benefit plan' and 'pension plan' mean any plan, fund, or pro-

gram . . . to the extent that . . . such plan, fund, or program —

(i) provides retirement income to employees . . .

". . .

". . .

"(3) The term 'employee benefit plan' or 'plan' means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

29 U.S.C. § 1056(d)(1), ERISA section 206(d)(1) provides as follows:

"Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

29 U.S.C. § 1144, ERISA section 514 provides as follows:

"(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . . .

". . .

"For purposes of this section:

". . .

"(2) The term 'State' includes a State, . . . which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter."

(ERISA § 514 was recently amended by P.L. 97-473 which was signed into law January 14, 1983. These amendments made no changes to the above quoted sections of ERISA § 514.)

The following additional constitutional and statutory provisions are reproduced in pertinent part in the appendix to this brief:

United States Constitution, Article VI, cl. 2
United States Constitution, Amendment X
28 U.S.C. § 1254(2)
28 U.S.C. § 1331
28 U.S.C. § 1441
ERISA
29 U.S.C.
Subchapter 1 — Protection of Employee Benefit Rights
Subtitle A — General Provisions
§ 1001 — Congressional findings and declaration of policy
Subtitle B — Regulatory Provisions
Part 1 — Reporting and Disclosure
§ 1021 — Duty of disclosure and reporting
Part 2 — Participation and Vesting
§ 1051 — Coverage
§ 1056(d) — Assignment or Alienation of Plan Benefits
Part 3 — Funding
§ 1081 — Coverage
Part 4 — Fiduciary Responsibility
§ 1103 — Establishment of trust
§ 1104 — Fiduciary duties
Part 5 — Administration and Enforcement
§ 1132 — Civil enforcement
California Revenue and Taxation Code § 18818

STATEMENT OF THE CASE.

The Franchise Tax Board is the agency of the State of California charged with the enforcement of the Personal Income Tax Law of the State of California and is authorized, pursuant to California Revenue and Taxation Code section

18817, to issue Notices to Withhold to enforce collection of unpaid tax liabilities.

ERISA regulates "employee benefit plans," which includes "pension plans" and "welfare plans." The Construction Laborers Vacation Trust For Southern California (CLVT) is a "welfare plan," which was established to provide vacation benefits to its participants. (ERISA sections 3(1), 3(2) and 3(3), 29 U.S.C. §§ 1002(1), 1002(2) and 1002(3).) CLVT will be referred to as a welfare plan or a vacation fund.

CLVT holds vacation funds on behalf of certain participants who are employed in the construction industry. These vacation funds are governed by some of the provisions of ERISA. The Board has attempted to levy on these vacation funds in order to collect the delinquent personal income taxes of certain participants of the funds. The primary issue in this case concerns these vacation funds. The Board has not levied on pension funds. Moreover, the Board is not taxing the vacation fund itself; it is merely levying on this vacation fund as a means of tax collection.

CLVT has refused to honor the Board's levy, basing its refusal on its allegation that California Revenue and Taxation Code section 18817 has been preempted by ERISA.

Pursuant to collective bargaining agreements between the Southern California District Council of Laborers and various employers' associations, the Construction Laborers Vacation Trust for Southern California was established on April 14, 1966. (J.A. 12, 13, 54.) The Agreement And Declaration Of Trust Establishing The Construction Laborers Vacation Trust For Southern California is reproduced at the Joint Appendix pp. 11-56.)

Under the terms of the Agreement and Declaration of Trust, a Vacation Fund was established to receive contri-

butions and to provide vacation benefits for eligible employees. (Trust Agreement, Section 2.02, J.A. 13.)

Contributions to the Vacation Fund are a part of the wages due to the employees covered by the collective bargaining agreement and are subject to withholding tax and social security and unemployment taxes. (Trust Agreement, Section 9.07, J.A. 48.)

Under the collective bargaining agreement, employers are obligated to pay to the Vacation Fund contributions for each hour worked on behalf of each employee whose work is covered by the agreement.

The Trust accumulates the contributions in a "vacation account" for each covered employee. The Trust issues checks annually for the vacation benefits to each covered employee who meets certain requirements set forth in the Trust Agreement. (Trust Agreement, Section 9.02, J.A. 45.)

The amounts credited to an employee's vacation account may not be accumulated from one annual period to another and if an employee fails to apply in a timely manner for such benefits or fails to cash a benefit check by a certain date, he shall be deemed to have contributed such amount to the cost of maintaining the vacation fund and checks already issued to him for such period will be void. (Trust Agreement, Sections 9.03-9.04; J.A. 46.)

The Agreement And Declaration of Trust provides that no payments due the Fund and no monies in vacation accounts established pursuant to the Plan shall be anticipated, alienated, sold, transferred, assigned, pledged, encumbered or charged by any employee or any other persons. (Trust Agreement, Section 9.08, J.A. 49.)

As stated, the Board served Notices to Withhold Personal Income Taxes pursuant to California Revenue and Taxation

Code section 18817 on CLVT in order to collect the unpaid personal income tax liabilities of certain participants from the vacation funds held by CLVT for those participants. Based on an opinion from the Department of Labor, the Trustees refused to honor said Notices to Withhold on the grounds that Revenue and Taxation Code section 18817 was preempted by ERISA, specifically ERISA section 514, 29 U.S.C. § 1144. (J.A. 66.) The Department of Labor opinion indicated that an Internal Revenue Service levy could be honored. (J.A. 72.)

Because CLVT refused to honor the Board's levy, the Board filed an action on June 13, 1980 for failure to honor garnishment and for declaratory relief in the Superior Court of the State of California for the County of Los Angeles. (J.A. 3.) The Board based its causes of action solely on State law. (J.A. 3-9.)

CLVT filed a Petition For Removal which alleged that the federal court had original jurisdiction over this proceeding pursuant to sections 403(c)(1) and 514 of ERISA (29 U.S.C. §§ 1103, 1104, 1144.) (J.A. 87-88.) CLVT alleged that the action was properly removed to federal court pursuant to 28 U.S.C. § 1441. (J.A. 88.) The case was removed to federal court. The Board filed a Motion To Remand pursuant to 28 U.S.C. § 1447(c) on the grounds that the District Court did not have jurisdiction of the subject matter of the action. The Board alleged the suit did not involve a claim or right arising under the Constitution, treaties or laws of the United States and that there was no other basis for the court's jurisdiction since the Board's cause of action arose solely under California law as construed and applied by the courts of the State of California. (Motion to Remand, p. 2.) The United States District Court for the Central District of California denied the Motion To Remand. (J.A. 105.)

CLVT filed a Motion to Dismiss on the ground that Revenue and Taxation Code section 18817 as the Board sought to apply it in this case was preempted by ERISA, specifically ERISA section 514, 29 U.S.C. § 1144. The Board filed its opposition to the Motion to Dismiss and the parties agreed that the Motion to Dismiss and opposition thereto could be treated as cross motions for summary judgment.

The United States District Court made its order granting summary judgment for the Board. On December 3, 1980, Findings of Fact and Conclusions of Law and Judgment were filed. (A.15-23.)

On December 16, 1980, CLVT filed its Notice of Appeal to the Court of Appeals for the Ninth Circuit. The case was argued before a three judge panel of the Court of Appeals. On June 22, 1982, the panel issued an opinion (one judge dissenting) reversing the District Court's granting of summary judgment for the Board. (A.1-14.) A Petition for Rehearing was timely filed. (A.25-36.) The panel issued an order on July 21, 1982 denying the Petition for Rehearing. (A.24.)

Two of the three Justices of the Court of Appeals found that although vacation funds are not specifically protected from creditors' claims under ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) as are pension funds, they are covered by implication, and further that Revenue and Taxation Code section 18817 is preempted by ERISA section 514(a), 29 U.S.C. § 1144(a) as a State law relating to an employee benefit plan insofar that it is used to levy against a vacation fund to satisfy a participant's delinquent taxes. The Court of Appeals relied for its opinion on the case of *Alessi v. Raybestos-Manhattan, Inc.* (1981) 451 U.S. 504 decided by this Court. The dissenting Justice found that the District

Court did not have jurisdiction of the action and even if it did possess jurisdiction, the California statute was not preempted by ERISA.

SUMMARY OF ARGUMENT.

Jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(2) because the Court of Appeals found that California Revenue and Taxation Code section 18817 is preempted by ERISA insofar as it allows the Board to levy on a welfare plan to collect a participant's delinquent taxes. Two other cases regarding the preemption of a State law by ERISA have been considered on appeal by this Court. *See Delta Airlines v. Kramarsky* (2d Cir. 1981) 666 F.2d 21, vacating (2d Cir. 1981) 650 F.2d 1287, prob. juris. noted, (1982) 102 S.Ct. 1968 and *Alessi v. Raybestos-Manhattan, Inc.* (1981) 451 U.S. 504.

The District Court did not have subject matter jurisdiction of this case. The Board brought this action for failure to honor garnishment and declaratory relief originally in State court. The action was based solely on State law. It did not "arise under" the laws, treaties or Constitution of the United States. The federal question was raised merely as a defense to the Board's causes of action.

California's tax levy statute is not preempted by ERISA because it does not regulate the terms and conditions of the vacation plan in this case. Rather, it is a statute of general application which operates in the field of tax collection, a field that is unrelated to the regulation of ERISA plans.

ERISA never specifically preempts California's tax levy statute. In the area of taxation, one of the police powers of the States, a statute will only be preempted if Congress expressly so states. Congress is capable of prohibiting levies and garnishment against federally regulated programs and it has done so with regard to veterans' benefits, social se-

curity and railroad retirement benefits. It has not protected vacation plans from levies of any kind.

ERISA's preemptive authority with regard to welfare plans is limited. ERISA, as originally enacted, contained Titles I through IV. Only Titles I and IV supersede State laws. Title IV has no application at all to welfare plans and Title I contains sections which do not apply to welfare plans. Only State laws which regulate in those specific areas are preempted. This case engenders none of the preemptive sections of ERISA.

This Court has already considered and rejected the argument that ERISA preempts California's community property laws. The Jurisdictional Statement in the case of *In re Marriage of Campa* (1979) 89 Cal.App.3d 113, 152 Cal.Rptr. 362, appeal dismissed, (1980) 444 U.S. 1028 set forth the question of whether ERISA preempted California's community property law. This Court dismissed the appeal for want of a substantial federal question which is a decision on the merits.

Numerous courts have found an exception in the ERISA preemption section within the context of spousal and child support. These courts have allowed ex-spouses and children of ERISA participants to levy on ERISA covered pension plans because it was determined this would further an important public purpose. This exception has been found notwithstanding the fact that pension plans are highly regulated by every section of ERISA and are specifically covered by ERISA's anti-alienation section.

Since pension plans have been breeched for important public purposes, it would be logical to assume that courts would allow levies against vacation funds. Indeed, two courts have allowed credit unions to levy on these funds. The case at bar is the first time as far as the Board is aware

that any court has prohibited a levy or garnishment against a vacation fund.

The California statute does not conflict with any provision of ERISA in regard to welfare benefits. Congress did provide in ERISA that pension plans shall not be assigned or alienated, but provided no language to give the same protection to welfare plans. It follows that Congress had no intent to give welfare plans the same protection.

The *Alessi* case centered on a state statute that directly regulated a calculation of pension benefits. Clearly, this was an attempt to "regulate" a pension trust. In *Alessi*, this Court carefully delineated that the decision on preemption applied only to the case before it and the court was not deciding the "outer bounds" of ERISA's preemptive language.

The case at bar could not be controlled by *Alessi*, contrary to the holding of the Ninth Circuit in this case, because the concept of preemption with regard to a pension fund cannot be applied to a vacation fund. This would be extending the "outer bounds" of ERISA's preemptive language far beyond the language of ERISA itself and the precise language used by this Court in the *Alessi* decision.

Furthermore, in contrast to the situation in *Alessi*, the California statute does not regulate a term or condition of CLVT's vacation plan.

Congress and this Court have been in agreement that federal courts should not interfere in the fiscal operations of the States. This Court has recognized the dangers inherent in disrupting the administration of State tax systems. Congress did not intend for ERISA to interfere with a State's tax collection statute.

ERISA should be interpreted in a manner which supports its constitutionality. If California is precluded by ERISA from collecting its taxes, this raises the question of whether ERISA violates the Tenth Amendment.

ARGUMENT.

I.

INTRODUCTORY STATEMENT.

The Ninth Circuit has prohibited the State of California from levying on a vacation fund partially regulated by ERISA.

The effect of this decision is to allow a potential of 400,000 individuals in California to shield their yearly vacation pay from a California tax levy. This vacation pay is collected as a benefit to the workers in the construction industry and is in no way related to the primary purpose of ERISA which is the protection of pension trusts. The Board contends there is no meaningful difference between this vacation fund and a bank account established by a worker not covered by ERISA. In the instance of a vacation bank account, no creditor would be denied access to these monies, particularly a State taxing agency.

It must be emphasized at the outset that ERISA regulates "employee benefit plans" which includes "pension plans" and "welfare plans." Since ERISA was enacted primarily as pension reform legislation, all of its provisions apply to pension plans. By contrast, only the provisions regarding information and disclosure, fiduciary responsibility and administration and enforcement apply to welfare plans.

The Construction Laborers Vacation Trust for Southern California (CLVT) is a "welfare plan," which was established to provide vacation benefits to its participants. It is not a "pension plan." CLVT will be referred to as a welfare plan or vacation fund.

To demonstrate the minimal level of protection this CLVT vacation fund has in contrast to pension funds, it is important to note that if the yearly vacation fund is not properly applied for or the check not cashed in a timely fashion, the money

reverts back to the fund. (Trust Agreement, Sections 9.03-9.04; J.A. 46.) How can this vacation pay be allowed to pay for administrative costs of the fund and yet be denied to the State of California as a source of collection for delinquent taxes?

The Board will be discussing numerous factors which support its position in this case. These include the following:

1. ERISA was enacted primarily as pension reform legislation.
2. Welfare plans (here vacation funds) are less regulated than pension plans.
3. The California statute does not regulate the terms or conditions of the vacation fund.
4. Congress has not expressly prohibited States from levying on vacation funds.
5. Numerous courts have found States' domestic relations laws not to be preempted by ERISA and have allowed levies against pension plans.
6. The vacation funds in this case revert to the CLVT for administrative expenses if the worker does not follow the proper procedures.
7. The Internal Revenue Service is allowed to levy against welfare and pension plans.

It is evident that in balancing the vital interest of the State of California in collecting its revenue against the purposes of a vacation fund, the conclusion is inescapable that California must be allowed to collect delinquent taxes from this fund.

II.

THE COURT OF APPEALS FOUND THAT CALIFORNIA REVENUE AND TAXATION CODE SECTION 18817 IS PREEMPTED AS APPLIED. THEREFORE, JURISDICTION IS PROPERLY INVOKED UNDER 28 U.S.C. § 1254(2).

On December 13, 1982, this Court agreed to hear the appeal of the Board, but postponed further consideration of jurisdiction to the hearing of the case on the merits. (J.A. 106.)

The Court of Appeals has held that California Revenue and Taxation Code section 18817 is preempted by ERISA and is unconstitutional as applied under the Supremacy Clause insofar as Revenue and Taxation Code section 18817 allows the Board to levy on an employee welfare benefit plan (in this case a vacation fund) to collect a participant's delinquent taxes. Thus, this Court's jurisdiction is properly invoked under 28 U.S.C. § 1254(2). (*See Delta Airlines v. Kramarsky* (2d Cir. 1981) 666 F.2d 21, vacating (2d Cir. 1981) 650 F.2d 1287, prob. juris. noted, (1982) 102 S.Ct. 1968 and *Alessi v. Raybestos-Manhattan, Inc.* (1981) 451 U.S. 504 wherein Courts of Appeal held state statutes preempted by ERISA.)

It is sufficient to invoke this Court's jurisdiction under 28 U.S.C. § 1254(2) that the state law was preempted by federal law, *see, Minnesota v. Northern State Power Co.* (1972) 405 U.S. 1035, aff'g. (8th Cir. 1971) 447 F.2d 1143 and that the state law was held invalid as applied to the circumstances of a particular case. (*New Orleans v. Dukes* (1975) 427 U.S. 297, 301; *Dutton v. Evans* (1970) 400 U.S. 74, 76, n. 6.)

The policy underlying 28 U.S.C. § 1254(2) is to ensure that state laws are not erroneously invalidated. (*New Orleans v. Dukes, supra*, 427 U.S. at 302.)

While the Board contends that the District Court did not have jurisdiction over this case, this Court still has jurisdiction under 28 U.S.C. § 1254(2) to hear and decide this appeal. *See Healy v. Ratta* (1934) 292 U.S. 263 where this Court had appellate jurisdiction to decide that the District Court did not have jurisdiction of a case because the amount in controversy did not meet the statutory minimum.

For these reasons, the Board contends this Court has jurisdiction to hear this appeal.

III.

THE UNITED STATES DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OF THIS ACTION.

It should be noted at the outset that the United States District Court did not have jurisdiction of this suit and after CLVT removed the action to the District Court, it should have been remanded to the State court.

A civil action may be removed from a State court where the District Court would have original jurisdiction of the action. (28 U.S.C. § 1441.)

In this case, the District Court did not have original jurisdiction because the Board's causes of action originally filed in State court were based solely on State law. Federal law (ERISA) was raised merely as a defense to the causes of action.[2]

The Board had the right to sue CLVT for failure to honor garnishment pursuant to California Revenue and Taxation Code sections 18817 and 18818 and the right to sue for declaratory relief pursuant to California Code of Civil Procedure section 1060. The Board's causes of action were not predicated on federal law; its authority to levy was authorized by State law.

It is clear that federal jurisdiction must be established solely by the complaint. (*Skelly Oil Co. v. Phillips Co.* (1950) 339 U.S. 667, 673-674; *Gully v. First National Bank* (1936) 229 U.S. 109, 113; *Tennessee v. Union & Planters' Bank* (1894) 152 U.S. 454, 459.)

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[2]CLVT alleged in its petition for removal that the subject action involved an employee benefit plan and thus the District Court had original jurisdiction over this action under ERISA sections 403(c)(1) and 404, 29 U.S.C § 1103(c)(1) and 29 U.S.C § 1104 which deal with fiduciary responsibility and ERISA section 514, 29 U.S.C. § 1144, which deals with preemption. (J.A. 88.)

The federal claim must not be asserted by way of defense. (*Gully v. First National Bank, supra,* 299 U.S. at 113.) The federal question must be disclosed upon the face of the complaint, unaided by the answer and the complaint itself will not serve as a basis of jurisdiction insofar as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. (*Phillips Petroleum Co. v. Texaco Inc.* (1974) 415 U.S. 125, 127-128; *Gully v. First Nat. Bank, supra,* 299 U.S. at 113.)

This Court has repeatedly and clearly held that in order for a claim to arise "under the Constitution, laws, or treaties of the United States," a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action. (*Phillips Petroleum Co. v. Texaco Inc. supra,* 415 U.S. at 127; *Gully v. First Nat. Bank* (1936) 299 U.S. at 112.)

The *Gully* case concerned an action by the State Collector of Taxes against a national bank as agent for its shareholders. This Court took the case to consider the jurisdiction of the District Court and decided that the District court did not have jurisdiction. This Court said:

> "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. The tax here in controversy if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it." (*Gully, supra,* 299 U.S. at 115.)

This is directly analogous to the case at bar in that California imposed the income tax under State law and was attempting to collect it solely under State law. By raising

the question of ERISA and preemption as a defense, CLVT could not give the United States District Court jurisdiction.[3]

Preemption is ordinarily a matter to be raised as a defense. Taken alone, it is not a proper basis for removal. *Guinasso v. Pacific First Fed. Sav. & Loan Assn.* (9th Cir. 1981) 656 F.2d 1364, 1366; *State of Washington v. American League of Prof. Base. Clubs* (9th Cir. 1972) 460 F.2d 654, 660.

The New York District Court case of *Nat. Bank of N. America v. Loc. 553 Pension Fund, Etc.* (E.D. N.Y. 1978) 463 F.Supp. 636, is very similar to the instant case. In that case, the provisions of ERISA were raised as a defense by the Trustees to an action of a judgment creditor to garnish a portion of a beneficiary's monthly pension benefits. The case was filed in State court and removed to Federal court. The District Court granted the motion to remand. The court stated that "[T]he resolution of this motion turns on whether the claim sued upon arises under federal law." (463 F.Supp. at 638.)

The Trustees argued that the case arose under federal law pursuant to ERISA section 502(a)(1)(B). (29 U.S.C. § 1132(a)(1)(B).) The court rejected the Trustees' argument and held that the creditor's claim and the relief sought derived entirely from state, rather than federal law. Thus, the District Court did not have subject matter jurisdiction. (463 F.Supp. at 639.)

California's claim did not "arise under" federal law. Federal law was raised only as a defense. Thus, the District Court did not have original jurisdiction of this case and it should not have been removed to federal court.

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[3]Any question of federal law raised by CLVT may be decided by the State court. This court recently reiterated the principle that State courts, like Federal courts, have a constitutional obligation to uphold federal law. (*California v. Grace Brethren Church* (1982) 102 S.Ct. 2498, 2513 n.37. Accord *Ex Parte Royall* (1885) 117 U.S. 241, 248.)

IV.

CALIFORNIA'S LEVY STATUTE IS NOT PREEMPTED BY ERISA SECTION 514(a).

A. California's Statute Does Not Relate to Benefit Plans Within the Meaning of ERISA Section 514.

ERISA section 514(a), 29 U.S.C. § 1144(a) provides that "State" laws *relating* to employee benefit plans are superseded. The term "State" is defined to mean ". . . a State . . . which purports to *regulate*, directly or indirectly, the *terms* and *conditions* of employee benefit plans. . . ." (Emphasis added.) (ERISA section 514(c)(2), 29 U.S.C. § 1144(c)(2).)

The more restrictive language of ERISA section 514(c)(2) qualifies the "relate to" language of ERISA section 514(a).[4] Thus, a State law only "relates" to an employee benefit plan if it *regulates* the *terms* and *conditions* of the plan. Clearly, California's levy statute is a law of general application which does not *regulate* a *term* or *condition* of the vacation fund. Rather, California's levy statute seeks only to implement the state's sovereign power to assess and collect taxes by securing the payment of delinquent taxes through a tax levy on vacation funds.

By specifically choosing the word "regulate", Congress shows it had no intention to preempt state laws that have no direct bearing on benefit plans. If Congress had intended to preempt state laws which had a peripheral effect on benefit plans, it could have used more general words such as "affect," "influence," or "connected with," or it could have provided that ERISA plans are totally immune from

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[4]See 25 U.C.L.A. L.Rev. 417, 515-516 (1978) and dissenting opinion of *Franchise Tax Bd., Etc. v. Const. Laborers, Etc.* (9th Cir. 1982) 679 F.2d 1307, 1312.

all State laws.[5] "ERISA section 514(a) was not . . . designed to preempt any state law with even the most tangential relation to ERISA." (*Stone v. Stone* (N.D. Cal. 1978) 450 F.Supp. 919,932, aff'd. (9th Cir. 1980) 632 F.2d 740, cert. denied (1981) 453 U.S. 922.) There is a "narrow category of laws which 'affect' employee benefit plans but which do not 'relate' to them within the meaning of § 514(a)." (*Id.*)

In *Provience v. Valley Clerks Trust Fund* (E.D. Calif. 1981) 509 F.Supp. 388, the District Court held that California's laws regarding fraud, bad faith, and intentional infliction of emotional distress did not "relate to" the employee benefit plan at issue and that State law will not be preempted by ERISA where the law has only an indirect effect on the plan, and where the law is one of general application which involves an area of important state concern. (509 F.Supp. at 391.) The California levy statute is just such a law of general application which involves the collection of taxes, an area of important state concern.

B. A State's Tax Statute Must Not Be Preempted by Implication.

ERISA does not specifically preempt California's tax levy statute and preemption by implication in the area of tax law would be contrary to decisions of this Court which have held that where Congress has legislated in a field which the States have traditionally occupied, " 'the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purposes of Congress.' " (*Ray v. Atlantic Richfield Co.* (1977) 435 U.S. 151, 157; quoting *Rice v. Santa Fe Elevator Corp.* (1947)

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[5]*See* Dissenting opinion, *Franchise Tax Bd., Etc. v. Const. Laborers, Etc., supra*, 679 F.2d 1307, 1312.

331 U.S. 218, 223 and *Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525.)

In deference to a State's domestic relations laws, this Court has held that those laws will only be preempted when Congress clearly has so provided. The Board contends that the same respect must be given to a State's tax laws. In *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, this Court has stated that when a state family law statute has come into conflict with a federal statute, this Court will determine:

> "... whether Congress has 'positively required by direct enactment' that state law be pre-empted. (Citation.) A mere conflict in words is not sufficient. State family and family property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden. (Citation.)" (439 U.S. at 581.)

It is clear that by enacting ERISA, Congress has not "positively required by direct enactment" that State tax levy statutes be preempted. In addition, these levy statutes do not do "major damage" to "clear and substantial" federal interests.

Congress has shown that it knows how to protect certain funds from state levy and attachment statutes when that is its intention. With respect to Social Security benefits, Congress has specifically said they could not be alienated or assigned and that they were not subject to "execution, levy, attachment, garnishment . . ." (42 U.S.C. § 407,) and with respect to Veteran's benefits, Congress has said such payments "shall be exempt from taxation" and "shall not be liable to attachment, levy, or seizure . . ." (38 U.S.C. § 3101(a).)

The Railroad Retirement Act of 1974 explicitly states that Railroad Retirement annuities are not subject to any tax. The Railroad Retirement Act of 1974 provides that "no

annuity . . . shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated. . . ." (45 U.S.C. § 231m.)

In *Hisquierdo v. Hisquierdo, supra*, 439 U.S. 572, this Court held that Railroad Retirement benefits are not subject to California's community property laws. As a part of its analysis of the Railroad Retirement Act, this Court pointed out that:

> "Even state collection laws must bow to its [the Railroad Retirement Act] command, for Congress added that phrase in an amendment designed in part to ensure that neither federal nor state tax collectors would encroach on the distribution of benefits." (*Hisquierdo v. Hisquierdo, supra*, 439 U.S. at 584.)

The Railroad Retirement Act's specific prohibition against a tax levy must be compared with ERISA which does not mention levy or garnishment at all.

These statutes and cases show how explicit Congress can be in protecting certain federal beneficiaries from general or tax levies. ERISA, which does not prohibit levy or garnishment at all, does not have this protective and explicit wording, particularly with regard to tax levies.

C. ERISA's Preemptive Authority With Regard to Welfare Plans Is Limited.

ERISA was enacted primarily as pension reform legislation. The basic purpose of ERISA was to protect the millions of people who depend on benefits from private pension plans for financial independence after retirement.[6]

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[6](*Stone v. Stone* (N.D. Cal. 1978) 450 F.Supp. 919, 926, aff'd. (9th Cir. 1980) 632 F.2d 740, cert. denied (1981) 453 U.S. 922; H. Rep. No. 93-533, 93d Cong., 2d Sess., 1974 U.S. Code Cong. and Admin. News, pp. 4639, 4640-4641; S. Rep. No. 93-127, 93d Cong., 2d Sess., 1974 U.S. Code Cong. and Admin. News, pp. 4838, 4839-4840.)

ERISA comprehensively regulates pension plans. Congress did not regulate as thoroughly with regard to welfare plans. Specifically, there are sections of ERISA which apply to *pension* plans only and do not apply to welfare plans. Both the statement of legislative intent contained in ERISA section 2, 29 U.S.C. § 1001 and the provisions of ERISA indicate that Congress meant to confine federal regulation of welfare plans to establishing minimum standards for reporting and disclosure and fiduciary responsibility. The regulation of pension trusts is much more pervasive.

As Justice Tang, the dissenting Justice in the opinion below, stated:

> "ERISA's limited regulation of welfare plans strongly suggests that Congress was more concerned with the possible dissipation of pension benefits than with the possible loss of employee welfare benefits. This difference in concern should not be surprising. In real world terms, the loss of one's pension is far more catastrophic than the loss of funds devoted to financing an annual vacation." (*Franchise Tax Bd., Etc. v. Const. Laborers, Etc.* (9th Cir. 1982) 679 F.2d 1307, 1311; dissenting opinion.)

ERISA, as originally enacted, contains Titles I through IV. Title I of ERISA is entitled Protection of Employee Benefit Rights. Title II concerns Amendments to the Internal Revenue Code Relating to Retirement Plans; Title III concerns Jurisdiction, Administration, Enforcement; Joint Pension Task Force, Etc., and Title IV concerns Plan Termination Insurance.

ERISA § 514(a) provides that only Titles I and IV will preempt State laws, thus narrowing the preemptive effect of ERISA. With regard to welfare plans, this preemptive effect has been further restricted because all of Title IV and parts of Title I do not apply to welfare plans.

The five sub-parts of Title I are as follows:

Part 1 — Reporting and Disclosure
Part 2 — Participation and Vesting
Part 3 — Funding
Part 4 — Fiduciary Responsibility
Part 5 — Administration and Enforcement

All of the sections of Title I apply to pension plans, while only the sections regarding reporting and disclosure, fiduciary responsibility and administration and enforcement apply to welfare plans. Welfare plans have been specifically excluded with regard to the parts entitled participation and vesting and funding.[7]

Thus, with regard to welfare plans, the only preemptive effect of ERISA would be where a State law regulated the terms and conditions of a welfare plan concerning information and disclosure, fiduciary responsibility or administration and enforcement. Revenue and Taxation Code § 18817 does not regulate ERISA plans in any way. Thus it is not preempted.

V.

STATE LAWS THAT FURTHER AN IMPORTANT PUBLIC PURPOSE HAVE NOT BEEN PREEMPTED BY ERISA.

All State laws cannot be preempted by ERISA because numerous courts have allowed levies authorized by State laws against pension funds and vacation funds when it was determined that this would further an important public purpose.

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[7] ERISA section 201(1), 29 U.S.C. § 1051, ERISA section 301(a)(1), 29 U.S.C. § 1081(a)(1).

A. Levies Against *Pension* Funds.

1. Domestic Relations.

Many courts have found that States' domestic relations laws are not preempted and have required trustees of ERISA-regulated pension plans to pay some or all of the pension payments directly to a participant's ex-spouse or children.[8]

These courts have allowed former spouses to garnish ERISA-regulated *pension* trusts due to the strong policy of deferring to the domestic relations laws of the states. This exception has been found notwithstanding the fact that pension plans are specifically addressed at ERISA section 206(d)(1), 29 U.S.C. 1056(d)(1) and pension plans are regulated by every section of ERISA.

In addition to the many courts which have held that domestic relations laws are not preempted by ERISA, the Departments of Labor and Treasury have also supported this concept.

In *American Tel. and Tel. Co. v. Merry* (2d Cir. 1979) 592 F.2d 118, the court pointed out that the amicus curiae brief filed for the Secretaries of Labor and Treasury argued that there is an implied exception to ERISA's anti-alienation provision for the enforcement of family support obligations. This is in contrast to the case at bar where the Department

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[8]*Carpenters Pension Trust Etc. v. Kronschnabel* (9th Cir.) 632 F.2d 745; cert. denied, (1981) 453 U.S. 922; *In re Marriage of Campa* (1979) 89 Cal.App.3d 113, 152 Cal.Rptr. 362, appeal dismissed for want of substantial federal question (1980) 444 U.S. 1028; *Operating Engineers, Etc. v. Zamborsky* (9th Cir. 1981) 650 F.2d 196; *Stone v. Stone* (N.D. Cal. 1978) 450 F.Supp. 919, aff'd. (9th Cir. 1980) 632 F.2d 740, cert. denied (1981) 453 U.S. 922; *American Tel. & Tel. Co. v. Merry* (2nd Cir. 1979) 592 F.2d 118; *Cody v. Riecker* (E.D. N.Y. 1978) 454 F.Supp. 22, affirmed (2nd Cir. 1979) 594 F.2d 314; *Central States, Southeast & Southwest Areas Pension Fund v. Parr* (E.D. Mich. 1979) 480 F.Supp. 924; *Senco of Florida, Inc. v. Clark* (M.D. Fla. 1979) 473 F. Supp. 902; *Cartledge v. Miller* (S.D. N.Y. 1978) 457 F. Supp. 1146.

of Labor advised CLVT not to honor the Board's levy, alleging that ERISA had preempted California's statute. (J.A. 71.)

The Board contends there is no justification for the Department of Labor's position that in one instance a pension may be levied against and in the next instance a clearly less regulated welfare plan cannot be levied against when the motivation in both cases is an important public purpose for the State.

The Ninth Circuit in *Operating Engineers v. Zamborsky* (9th Cir. 1981) 650 F.2d 196 held that an ERISA regulated pension fund was subject to garnishment by an ex-spouse to satisfy alimony obligations. The Court found that Congress did not intend to preempt the area of domestic relations.

The Court in *Stone v. Stone* (9th Cir. 1980) 632 F.2d 740, cert. denied (1981) 453 U.S. 922 affirmed the District Court decision, *Stone v. Stone* (1978) 450 F.Supp. 919, which held that ERISA did not preempt a state court from ordering an ERISA-regulated pension plan to pay a a portion of a plan participant's pension benefits directly to his or her ex-spouse.

The Ninth Circuit in *Carpenters Pension Trust, Etc. v. Kronschnabel* (9th Cir. 1980) 632 F.2d 745, cert. denied (1981) 453 U.S. 922 (relying on the case of *In re Marriage of Campa* (1979) 89 Cal.App.3d 113, 152 Cal.Rptr. 362, appeal dismissed (1980) 444 U.S. 1028), held that ERISA does not preempt State court orders directing an ERISA-regulated pension plan to pay a community property share of a pension plan participant's monthly benefit payments directly to his or her ex-spouse.

The Second Circuit in *American Tel. and Tel. Co. v. Merry* (2nd Cir. 1979) 592 F.2d 118 held that an ex-spouse

could garnish ERISA-regulated *pension* benefits to satisfy alimony and support obligations. The Second Circuit stated that it would be unreasonable to conclude "that Congress intended to preempt even those state laws that only in the most remote and peripheral manner touch upon pension plans." (*Id.* at p. 121.)

In the case of *In re Marriage of Campa, supra*, 89 Cal.App.3d 113, 152 Cal.Rptr. 362, appeal dismissed (1980) 444 U.S. 1028, the California Court of Appeal held that ERISA does not preempt a state court order in a dissolution which requires the trustees of an ERISA pension plan to divide pension payments between the employee and his or her ex-spouse. The California Supreme Court denied the pension plan's petition for hearing. (89 Cal.App.3d at 132) The pension plan appealed to this Court.[9]

This Court dismissed the pension plan's appeal for want of a substantial federal question, (1980) 444 U.S. 1028, which is a decision on the merits. (*Hicks v. Miranda* (1975) 422 U.S. 332, 343-345.)

In dismissing the *Campa* appeal for want of a substantial federal question, this Court has already considered and rejected the argument that ERISA preempts a state-court order requiring the trustees of a pension plan to make certain

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[9]The Jurisdictional Statement in *Campa* set forth the following questions on appeal:

1. Do the provisions of Title 1 of the Employee Retirement Income Security Act, commonly known as ERISA, supersede the provisions of the California community property law and implementing statutes and court rules insofar as they relate to an employee benefit plan covered by that Act?
2. Does a state court have jurisdiction to order the board of trustees of an employee pension benefit plan covered by ERISA to make benefit payments in violation of the provisions of the documents and instruments governing the plan?

The Jurisdictional Statement was reprinted in *Carpenters Pension Trust, etc. v. Kronschnabel* (9th Cir. 1980) 632 F.2d at 748.

payments to a participant's ex-spouse. (*Carpenters Pension Trust, Etc. v. Kronschnabel, supra,* 632 F.2d 745, 748.)

It is clear that if a State's domestic relations laws are not preempted under ERISA section 514(a), 29 U.S.C. § 1144(a), then State laws with respect to tax levies should not be preempted, especially when the levy is against a welfare plan.

2. Judgment Creditors.

In *National Bank of N.A. v. Intern. Broth., etc.* (1979) 419 N.Y.S.2d 127, 69 A.D.2d 679, appeal dismissed, 48 N.Y.2d 752, 422 N.Y.S.2d 666, 397 N.E.2d 1333, the court allowed a creditor to levy on or garnish a pension trust regulated by ERISA. The Trustees argued first that ERISA preempts all State statutes which affect the regulation of pension plans and next argued that garnishment was expressly prohibited by ERISA section 206(d), 29 U.S.C. § 1056(d). The court held that there was no absolute preemption of the State's procedures for enforcing money judgments.

The court concluded:

> "A State will be pre-empted only when it tends to invade an aspect of the regulation of pension funds that is governed by ERISA as established in the Federal act. However, New York's vital interest in assuring the enforceability of our courts' judgments is wholly peripheral to the purposes of ERISA (citation). [The state statute] makes no attempt to regulate pension plans and presents no cognizable encroachment upon the exclusive province of ERISA regulation." (419 N.Y.S.2d at 130.)

The Board contends that the *National Bank of N.A.* case is directly analogous to the case at bar as again, the State statute makes absolutely no attempt to regulate ERISA welfare plans.

B. Levies Against Vacation Funds.

It is clear from the authority previously discussed that under ERISA, pension trusts have been more closely guarded than vacation funds, but even the pension trust can be invaded for a variety of reasons. Vacation plans do not enjoy the same high protection. Thus, it is not surprising that courts have allowed levies against vacation funds even by creditors who did not have a high public purpose such as the collection of public revenue.

A recent case from the District Court in Ohio declined to follow the majority opinion in the case at bar and instead relied on the analysis of Justice Tang, the dissenting Justice, to find that a creditor could levy on a vacation fund.

The case of *Local Union 212, Etc. v. Local 212 IBEW Credit Union* (S.D. Ohio, 1982) 549 F.Supp. 1299 is analogous to the one now before this Court. In *Local Union 212*, a credit union attempted to garnish certain beneficiaries' interests in an ERISA-covered vacation trust fund established by a bargaining agreement. The District Court, relying on the reasoning of Justice Tang, found that ERISA does not preclude a creditor from garnishing a vacation fund. The court based this opinion on its conclusion that ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) protected only pension plans and not vacation plans, and that ERISA 514(a), 29 U.S.C. § 1144(a) did not preempt the garnishment because Congress did not intend to protect vacation plans from garnishment. The court noted that in order for preemption to come into play, there must be some express or implied provision of ERISA which deals with vacation plans. The court found none. (549 F.Supp. at 1302.)

Finally, the court concluded that the garnishment statute did not "relate to" the vacation fund; and that any "regulating" effect on the plan regarding the administrative ex-

pense of processing the garnishment notices, was minimal. (*Id.*)

In another case, the Supreme Court of Missouri allowed a credit union to garnish a vacation fund. At issue in *Elec. Workers v. IBEW-NECA Holiday Trust* (1979) 583 S.W.2d 154, was whether a credit union could garnish the Holiday Trust Fund pursuant to a judgment it had obtained against an IBEW member.

The Court allowed the credit union to garnish the fund. The Court found that the Missouri state law was not preempted and there was no conflict with ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1), because the Holiday Trust was not a pension benefit plan. The Court then had to consider whether ERISA section 514(a), 29 U.S.C. § 1144(a) would preempt Missouri's state law.

Citing the test set forth in *Stone v. Stone*, the Court stated, "The question we must answer is whether the Missouri state laws and policies we might wish to apply 'fall into [the] narrow category of laws which affect employee benefit plans but which do not relate to them within the meaning of [§ 1144(a)].' " (*Elec. Workers, supra*, 583 S.W.2d at 158.)

The court then discussed the cases which have broadly construed ERISA section 514(a), 29 U.S.C. § 1144(a) and contrary cases such as *Stone v. Stone, supra*, which "have been reluctant to invalidate so much state legislation when the intent of Congress is not unmistakenly clear." (*Elec. Workers, supra*, 583 S.W.2d at 159.) The Court agreed with the court in *Gast v. Oregon* (1978) 36 Or.App. 441, 585 P.2d 12 that Congress did not mean "to pre-empt areas of state regulation not addressed by ERISA or to leave such areas totally unregulated . . ." (*Id.*) The court concluded, "The enforcement of state court money judgments by

creditors is a valid area of state concern, and is one which is totally unregulated by ERISA with respect to welfare plans." (*Id.*)

VI.

CALIFORNIA'S LEVY STATUTE DOES NOT DIRECTLY CONFLICT WITH ANY PROVISION OF ERISA REGARDING WELFARE PLANS.

Congress has been silent regarding the alienation of the vacation benefits involved in this lawsuit. Therefore, the California statutes which allow the Board to levy on vacation benefits do not directly conflict with ERISA and a conflict should not be implied.

There is no section of ERISA which prohibits the Board from levying on a welfare or vacation fund. This must be contrasted with ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) which specifically provides that "Each *pension* plan shall provide that benefits provided under the plan may not be assigned or alienated." (Emphasis added.) It is clear that ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) applies only to pension funds and does not cover "employee welfare benefit plans" such as the vacation fund at issue. (*Local Union 212, Etc. v. Local 212 IBEW Credit U.* (S.D. Ohio, 1982) 549 F.Supp. 1299; *Elec. Workers v. IBEW-NECA Holiday Trust* (1979) 583 S.W.2d 154, 157, 159.)[10]

Although ERISA specifically protects pension plans from alienation (the Board has discussed numerous exceptions), there is no language in ERISA or the legislative history

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[10]ERISA section 201, 29 U.S.C. § 1051 which defines the coverage of Part 2, Participation and Vesting, excludes employee welfare benefit plans (vacation funds) from its coverage. ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) is a part of Part 2, Participation & Vesting. Therefore, by the terms of ERISA section 201(1), 29 U.S.C. § 1051 and by the terms of ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) itself, the non-alienation language applies only to pension plans.

which indicates that Congress intended to protect vacation plans from garnishment proceedings by a beneficiary's creditors. (*Local Union 212, Etc. v. Local 212 IBEW Credit U., supra*, 549 F.Supp. 1299, 1302.)

Congress has recognized the different status of pension and welfare plans and has specifically stated that pension plans should not be alienated but has not afforded the same protection to welfare plans. If Congress had intended to impose non-alienation conditions on welfare plans, it would have done so clearly and unambiguously. The fact that Congress did not prohibit the alienation of welfare plans is strong evidence that Congress did not intend to prohibit levies against these funds.

VII.

THE ALESSI CASE DID NOT DECIDE THE QUESTION OF PREEMPTION WITH REGARD TO WELFARE PLANS.

Two of the Ninth Circuit Justices in the case at bar relied on the case of *Alessi v. Raybetos-Manhattan, Inc.* (1981) 451 U.S. 504 to find that California's tax levy statute was preempted. The Board contends that *Alessi* has no application to the case at bar.

In *Alessi* this Court found that a New Jersey statute was preempted by ERISA section 514(a), 29 U.S.C. § 1144(a), because it eliminated one method for calculating ERISA pension benefits that was permitted by federal law. This Court found that the New Jersey law applied directly to the calculation of the ERISA pension benefits. (*Alessi, supra*, 451 U.S. at 524-525.)

In the *Alessi* case, this Court noted that it was only deciding the case before it and was not deciding the question of how broadly ERISA's preemption section should be applied. This Court said:

> "We need not determine the outer bounds of ERISA's pre-emptive language to find this New Jersey provision an impermissible intrusion on the federal regulatory scheme." (*Alessi, supra*, 451 U.S. at 525.)

The Franchise Tax Board contends that the *Alessi* case has no application to the case at bar because *Alessi* concerned *pension* trusts while the case at bar concerns *vacation* trusts.

In addition, the New Jersey statute obviously was a direct regulation of ERISA pension plans because it mandated how they must not be calculated. The California statute, by contrast, does not even mention ERISA plans and in no way attempts to regulate ERISA-covered benefits.

VIII.

CONGRESS IS CONCERNED WITH THE FISCAL OPERATIONS OF THE STATES.

Congress has recognized the importance of not interfering with a State's right to manage its fiscal affairs and thus never intended ERISA to be used as a method of interfering with the collection of taxes. By enacting 28 U.S.C. § 1341, Congress has provided that no district court shall enjoin the assessment, levy or collection of a tax. In several recent cases interpreting that statute, and in cases relying on the principle of comity, this court has repeatedly held that the federal courts shall not interfere with a State's ability to collect its taxes. (*See California v. Grace Brethren Church* (1982) 102 S.Ct. 2498, 2509; *Fair Assessment In Real Estate v. McNary* (1981) 454 U.S. 100; *Rosewell v. La Salle National Bank* (1981) 450 U.S. 503, 522; *Tully v. Griffin, Inc.* (1976) 429 U.S. 68, 73; *Great Lakes v. Huffman* (1943) 319 U.S. 293, 298.)

In addition, this Court has recently stated: "This Court has long recognized the dangers inherent in disrupting the

administration of state tax systems." *California v. Grace Brethren Church* (1982) 102 S.Ct. 2498, 2509, n.23.

The Board contends that this principle is directly applicable to the case at bar. It is obvious that if ERISA is interpreted to prohibit California from levying on a vacation fund, it will interfere with the revenue collection process of the State of California. Congress never intended ERISA to have this effect.

IX.

THE NINTH CIRCUIT HAS ERRONEOUSLY CONSTRUED ERISA IN A MANNER WHICH INTERFERES WITH THE SOVEREIGN RIGHT OF CALIFORNIA TO ASSESS AND COLLECT TAXES.

ERISA should be interpreted in a manner which supports its constitutionality. Therefore, ERISA should not be interpreted to preclude a State from assessing and collecting its taxes, rights reserved to the States under the Tenth Amendment.

The power to tax is an incident of sovereignty and is coextensive with sovereignty. (*Harvester Co. v. Dept. of Taxation* (1944) 322 U.S. 435, 444-445; *Curry v. McCanless* (1938) 307 U.S. 357, 366. It follows that "A necessary incident of power to tax property is the power to uniformly enforce the collection of the tax by any constitutional means deemed appropriate to that end." (*United States v. Hester* (10th Cir. 1943) 137 F.2d 145, 147-148.)

The State of California has a vital interest in collecting taxes from taxpayers. This vital interest was recognized long ago by this Court in *Dows v. City of Chicago* (1870) 78 U.S. (11 Wall.) 108, where a National Bank tried to restrain the collection of a tax levied by the City of Chicago upon the bank's capital shares. This Court decided that no court could enjoin the collection of the tax, and stated as follows:

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." (*Dows, supra*, 78 U.S. at 110.)

This court has also stated that "The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government." (*Springer v. United States* (1880) 102 U.S. (12 Otto) 586, 594), and that "[T]axes are the lifeblood of government, and their prompt and certain availability an imperious need." (*Bull v. United States* (1935) 295 U.S. 247, 261; *Accord G.M. Leasing Corp. v. United States* (1977) 429 U.S. 338, 350.)

ERISA section 514(a) may be unconstitutional if it interferes with the sovereign right of the State of California to uniformly collect taxes from all of its citizens. Thus, ERISA should be interpreted so that it does not interfere with this right. As this Court said in *Machinists v. Street* (1961) 367 U.S. 740, 749, "Federal statutes are to be construed as to avoid serious doubt of their constitutionality." (*Accord, Lynch v. Overholser* (1962) 369 U.S. 705, 710-711.) In *Fry v. United States* (1975) 421 U.S. 542, this Court stated as follows:

> "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' (Citation), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." (421 U.S. at 547 n. 7.)

In *National League of Cities v. Usery* (1976) 426 U.S. 833, this Court held that even the Commerce Clause did not

give Congress the authority to intrude upon a State's performance of essential government functions. This Court said:

> "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." (426 U.S. at 845.)

The Franchise Tax Board respectfully contends that the Ninth Circuit's interpretation of ERISA is incorrect in that Congress did not intend to preempt California's statute. Furthermore, ERISA should not be interpreted to interfere with the sovereign power of California to assess and collect its taxes.

CONCLUSION.

First, the Board unmistakeably demonstrated that the District Court had no jurisdiction over this case. Secondly, the arguments presented herein are conclusive in validating the Board's right to levy against a vacation fund by showing the clear distinction between a pension trust and a vacation fund. ERISA's beneficial purposes are not affected or regulated in any way by the Board's levy.

The restrictive language of *Alessi* regarding preemption as it affects pension trusts shows that the Board is justified in collecting delinquent taxes from a vacation fund. In addition to this, numerous courts have stated that even the sensitive area of pension trusts can be invaded for a high public purpose. Two courts have shown no compunction to protect vacation funds from ordinary creditors.

For these reasons, the Board respectfully contends that the decision of the Ninth Circuit Court of Appeals below should be reversed.

Respectfully submitted,

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APPENDIX.

Constitutional and Statutory Provisions.

United States Constitution Article VI, cl. 2:
Supreme Law of the Land

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution of laws of any State to the contrary notwithstanding.

United States Constitution, Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. § 1254 provides in pertinent part:

Courts of appeals; certiorari, appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) . . .

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

28 U.S.C. § 1331
Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. § 1441 provides in pertinent part:

Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

ERISA, 29 U.S.C., provides in pertinent part:

Subchapter I

Protection Of Employee Benefit Rights

Subtitle A — General Provisions

§ 1001 Congressional findings and declaration of policy (ERISA § 2)

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important

factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect

thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

Subtitle B — Regulatory Provisions

Part 1 — Reporting and Disclosure

§ 1021 Duty of disclosure and reporting (ERISA § 101)

Part 2 — Participation and Vesting

§ 1051 Coverage (ERISA § 201)

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than —

(1) an employee welfare benefit plan;

§ 1056(d)(1) Assignment or alienation of plan benefits (ERISA § 206(d)(1))

Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

Part 3 — Funding

§ 1081 Coverage (ERISA § 301)

(a) This part shall apply to any employee pension benefit plan described in section 1003(a) of this title, (and not exempted under section 1003(b) of this title), other than —

(1) an employee welfare benefit plan; . . .

Part 4 — Fiduciary Responsibility

§ 1103 Establishment of trust (ERISA § 403)

. . . .

. . . .

(c)(1) Except as provided . . . the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

. . . .

§ 1104 Fiduciary duties (ERISA § 404)

(1) Subject to sections . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

Part 5 — Administration and Enforcement

§ 1132 Civil enforcement (ERISA § 502)

Persons empowered to bring a civil action

(a) A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) Except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (ii) of this section.

. . . .

. . . .

. . . .

Jurisdiction

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

Amount in controversy; citizenship of parties

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

. . . .

. . . .

California Revenue and Taxation Code section 18818 provides as follows:

§ 18818. Liability for failing to withhold pursuant to notice.

Any employer or person failing to withhold the amount due from any taxpayer and to transmit the same to the Franchise Tax Board after service of a notice pursuant to Section 18817 is liable for such amounts.